71-1315

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MICHAEL RODAK, JR., CL

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No.

HOWARD ALEXANDER,
FRANK COLLIER,
VILLAGE BOOKS, INC.,
MEDIA ARTS, and
GUILD PRESS, LTD.

*Petitioners*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above entitled case on January 17, 1972:

## OPINIONS BELOW

On May 19, 1970, the Commonwealth Attorney for the City of Portsmouth, Virginia, initiated litigation to bring the

Petitioners before the Court of Hustings for the City of Portsmouth. A Petition, to declare some 300 books and magazines to be obscene and to temporarily restrain their sale, was filed and on June 3, 1970, the Court of Hustings for the City of Portsmouth, Virginia, issued a Rule to Show Cause, returnable June 12, 1970, which hearing was continued until August 19, 1970. The Petitioners filed a Motion to Dismiss the Petition, alleging the Virginia Statute to be unconstitutional, which was denied by the Court of Hustings. Trial was held on November 4 and 5, 1970, resulting in the Court of Hustings for the City of Portsmouth declaring all of the books and magazines involved to be obscene and enjoining their sale on November 20, 1970. The Opinion of the Court of Hustings for the City of Portsmouth is unreported, but appears at Record Page (A 16), and the Rule to Show Cause and the Injunction appear at Record Page (A 18). The Petitioners appealed to the Supreme Court of Virginia which Appellate Court affirmed the action of the Court of Hustings for the City of Portsmouth, in an Opinion dated January 17, 1972, which is reported at 212 Virginia 554, S.E.2d , Record Page, (A 1).

## JURISDICTION

The judgment of the Court of Hustings for the City of Portsmouth was entered on November 20, 1970, pursuant to Section 18.1-236.3 of the Annotated Code of Virginia. The Opinion of the Supreme Court of Virginia, affirming the Court of Hustings for the City of Portsmouth, was entered on January 17, 1972. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257, (2,3); §1201(c).

## QUESTIONS PRESENTED

I. Is §18.1-236.3, of the Annotated Code of Virginia repugnant to the Constitution of the United States of America by prohibiting a jury trial to determine obscenity and by permitting a prior restraint on literary material, and by providing for a city-wide community standard for judging

obscenity rather than a national community standard, and by providing for establishing a fact, through civil proceedings, for use in criminal prosecution, all in violation of the First, Fifth, Sixth, Seventh, and Fourteenth Amendments to the Constitution of the United States of America?

II. Are the approximately 300 books and magazines, enjoined from sale by the Court below, obscene in the constitutional sense, without sale or exhibition to juveniles, obtrusive advertising or pandering?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fifth, Sixth, Seventh and Fourteenth Amendments to the Constitutions of the United States of America and the provisions of §18.1-236.3 of the Annotated Code of Virginia, are set forth in the Appendix hereto at Pages 23a and 24a.

## STATEMENT OF THE CASE

On May 19, 1970, the Commonwealth Attorney for the City of Portsmouth, caused to be issued a Writ of Subpoena Duces Tecum to the Petitioners, Howard Alexander and Frank Collier, both employees of the "Adult" bookstore in the City of Portsmouth, Virginia, operated by the Petitioner, Village Books, Inc. The Subpoena commanded their appearance on May 22, 1970, in the Court of Hustings for the City of Portsmouth, to bring with them copies of approximately 300 books and magazines. Petitioner, Frank Collier, who was served with the Subpoena Duces Tecum, appeared in the Court of Hustings for the City of Portsmouth upon that date with the books and magazines named, which constituted 99% of the literature offered for sale at the Petitioner's "Adult" bookstore in the City of Portsmouth, Virginia. The Commonwealth Attorney took the books and magazines and thereafter, on January 3, 1970, the Court of Hustings for the City of Portsmouth issued a Rule to Show Cause why the books

should not be adjudicated obscene, pursuant to a Petition for an Order temporarily restraining the sale or distribution of all of the named books and magazines. On June 12, 1970, the return day on the Order to Show Cause, the Petitioners appeared through Counsel, to request a Stay of Proceedings upon the ground that an Adversary Hearing had not been affored to the Petitioners upon the issue of obscenity prior to the seizure of the books and magazines. The Court of Hustings for the City of Portsmouth denied the Motion for a Stay, but continued the hearing on the Petition for an Order temporarily restraining the sale or distribution of the questioned books and magazines. The Petitioners filed an Answer to the Petition and a Motion to Dismiss the Petition, which was heard by the Court of Hustings for the City of Portsmouth, on August 19, 1970. Following the denial of the Petitioners' Motion to Dismiss, the case was tried by the Court of Hustings for the City of Portsmouth, without a jury, on November 4 and 5, 1970. At the trial, it was stipulated that the Petitioners' "Adult" bookstore did not sell or distribute any literature to juveniles, (T. 3). The City of Portsmouth introduced as a witness, an insurance salesman, Mr. Robert L. Holly, in an effort to establish the community standards of acceptance of comparable erotic literature. Mr. Holly was permitted by the Court of Hustings to testify as an expert on community standards, (T. 37), and stated his opinion that generally the books and magazines at issue exceeded the community standards of erotic materials, (T. 45-46). Although he is not established as an expert in any other field, Mr. Holly was also permitted to testify, over objection, regarding his opinion of the prurient appeal and social value of the questioned literature, (T. 47). He was of the opinion that some of the books and magazines, without differentiating which books or magazines he was referring to, had redeeming social value, (T. 47). He was of the opinion that none of the books and magazines could be considered "hard core pornography", (T. 53), and he felt that portrayal of sexual organs in photographs exceeded the community standards, (T. 57). The Commonwealth then offered the testimony

of a psychiatrist, Dr. Donald Lee Mingione, who was of the opinion that the books and magazines would appeal to the prurient interest, which he considered to be an appeal to sexual arousement, (T. 63, 71). The Commonwealth then introduced as a witness, Mr. Richard Messenger, the proprietor of a printing establishment, who relied upon bulletins from the National Association of Printers to ascertain what he should be permitted to print (T. 83, 98); Mr. Messenger also was a Captain of the Auxiliary Police Force of the City of Portsmouth, (T. 84). The witness was of the opinion that the questioned literature would appeal to the prurient interest, which he considered mere sexual arousal, (T. 86). He considered only seven (7) of the books, out of approximately 300, to be obscene, (T. 87). And he determined that there was social value for art students in several of the magazines, (T. 89), and that more than one half of the books and magazines involved would not be obscene in his opinion, (T. 90). His determination of the prurient appeal was as to the literary materials appealing to "Young Persons" under nineteen (19) years of age, (T. 95), not adults. The Petitioners, following the denial by the Court of Hustings of their Motion to Strike, (T. 108-110), offered the testimony of Dr. Wilbur Hammon, a U.S. Government psychiatrist, employed at St. Elizabeth's Hospital in Washington, D.C., and engaged in the private practice of medicine, specializing in psychiatry in the State of Virginia, (T. 111). Dr. Hammon was of the opinion that the books involved would not appeal to the prurient interest of the average viewer, (T. 116), although they only had a limited social value, (T. 124), and that the magazines did not constitute hard core pornography, (T. 127). Thereafter, the Petitioners presented the testimony of Dr. Donald W. Nachand, a practicing psychologist, employed at the Eastern Shore State Hospital, in Cambridge, Maryland, (T. 152), who was of the opinion that the literary materials would not appeal to the prurient interest of the average viewer, (T. 154), and that they did not exceed community standards of tolerance in the acceptance of erotic material and that they had redeeming social value, (T. 155-158). Dr.

Nachand agreed with the prior witnesses that the books and magazines could not be considered "hard core pornography", (T. 159). The Court of Hustings would not consider the results of the Presidential Commission Report on Pornography, (T. 180). The Petitioners also offered the testimony of Dr. Herman Kastner, a psychiatrist engaged in private practice in the State of Maryland, who was of the opinion that the challenged material would not appeal to the prurient interest of the average person in the community, (T. 193-194), and that the literature did contain socially redeeming material, (T. 196-197), and that the magazines containing photographs of simulated sexual activity would not necessarily appeal to the prurient interest of the average person, (T. 207). Following the testimony, the Petitioners, through Counsel, again moved the Court to enter judgment in favor of the Petitioners, which was denied, and the Court entered an Order declaring obscene, and enjoining the sale of all of the approximately 300 questioned books and magazines. Petitioners appealed to the Supreme Court of Virginia, which Court on January 17, 1972, affirmed the action of the Court of Hustings for the City of Portsmouth, Record Page, (A 1).

## HOW FEDERAL QUESTIONS ARE PRESENTED

Prior to the trial in the Court of Hustings for the City of Portsmouth, Virginia, Petitioners raised as issues the constitutionality of §18.1-236.3 on the Annotated Code of Virginia, alleging that the Code violated the First and Seventh Amendments to the Constitution of the United States of America, by denying a trial by jury in an obscenity litigation and that the Virginia Code section provided for a prior restraint on literary materials in violation of the First Amendment to the Constitution of the United States of America and the Virginia Code section provided for a local, city-wide, community standard for judging obscenity rather than a statewide or national standard, in violation of the First and Fifth Amendments to the Constitution of the United States of

America, and that the Virginia Code section was vague and indefinite, in providing for proof of a fact for use in subsequent criminal proceedings, (scientor or knowledge of obscenity), by means of a civil proceeding in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America. At the trial in the Court of Hustings for the City of Portsmouth, Petitioners raised the issue that all of the books and magazines were protected by the First Amendment and not obscene and following the issuance of a permanent injunction by the Court of Hustings for the City of Portsmouth, the Petitioners urged reversal in the Supreme Court of Virginia, upon the additional basis that the Virginia Code was vague and indefinite, and the procedures followed were unconstitutional, in that the Court of Hustings for the City of Portsmouth issued a permanent injunction which was not provided for by §18.1-236.3 of the Annotated Code of Virginia. All of the foregoing questions were decided adversely to the Petitioners' position by the Court of Hustings of the City of Portsmouth and the Supreme Court of Virginia.

## REASONS FOR GRANTING THE WRIT

I. Petitioners argue that §18.1-236.3 of the Code of Virginia is repugnant to the Constitution of the United States of America.

In the Court of Hustings for the City of Portsmouth, Petitioners demanded a trial by jury, (T. 3, 8/19/70), which was denied by the Court. Subsection 8 of §18.1-236.3 of the Code of Virginia, provides for trial without a jury. This Court in *Roth v. United States*, 354 U.S. 476, determined that a jury trial is constitutionally mandated to determine the issue of obscenity under the First Amendment to the Constitution of the United States of America. This Court did not reach that issue in its determination of the constitutionality of the New York State statute in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, see the dissenting opinion of Mr. Justice Brennan.

The Petitioners also allege that Section 18.1-236.3 of the Code of Virginia is repugnant to the First Amendment to the Constitution of the United States of America, made applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, *Mapp v. Ohio*, 367 U.S. 643, in that the Virginia Code, § 18.1-236.3, subsections 3 and 4, permit a prior restraint of literary materials by authorizing a temporary restraining order prohibiting the dissemination of alleged obscene materials without providing for an adversary hearing on the issue of obscenity prior to any restraint, *Freedman v. Maryland*, 380 U.S. 51; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Marcus v. Search Warrants*, 367 U.S. 717; *Quantity of Books v. Kansas*, 378 U.S. 205; *Tyrone v. Wilkinson*, 410 F.2d 639.

Subsection 8(b) of Section 18.1-236.3 of the Code of Virginia is repugnant to the First and Fifth Amendments to the Constittution of the United States of America, by establishing an improper local city-wide community area to establish standards of measuring the degree of tolerance of erotic material, rather than considering the state-wide or national contemporary community standards of acceptance of erotic materials. The application of a local area rather than a statewide or national area in considering contemporary community standards of tolerance of erotic literature is unconstitutional. Local guidelines are not appropriate, for if local contemporary community standards for what they might proscribe as obscene, " . . . the constitutional limits of free expression in a nation would vary with state lines." *Pennekamp v. Florida*, 328 U.S. 331 at 335. Under this local area standard a book acceptable in Richmond could be condemned in Norfolk, less than 100 miles removed. It was to avoid that unthinkable result that Mr. Justice Brennan, announcing the judgment of this Court in *Jacobellis v. Ohio*, 378 U.S. 184, said, "The constitutional status of an alleged obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding." *Id.* at Page 195; see also the concurring opinion of Mr. Justice Harlan in *Manual Enterprises v. Day*, 370 U.S. 478 at 488.

Petitioners argue that Section 18.1-236.3 is unconstitutionally vague in violation of the First, Fifth, Sixth, Seventh and Fourteenth Amendments to the Constitution of the United States of America in that the Virginia Code provides for a quasi-criminal proceeding for the purpose of civilly establishing a proven fact (knowledge of obscenity or scienter) for use in a criminal prosecution, without affording the defendant-respondent his constitutional right to a trial by jury on all issues of fact in a criminal case. Subsection 13 of Section 18.1-236.3 of the Code of Virginia provides that the proceedings, "shall be intended only to establish scienter in cases where the establishment of said scienter is thought to be usable or desirable by the Petitioner", (The Commonwealth Attorney). At any subsequent criminal trial the introduction of a finding of the Court of Hustings for the City of Portsmouth relating to knowledge of obscenity or scienter, in any criminal case would clearly be unconstitutional and deny the party defendant therein, of his right to confront witnesses and of his right to a jury determination of each and every issue.

Section 18.1-236.3 of the Code of Virginia is unconstitutionally vague in that it provides for a temporary restraining order, but it does not provide for the issuing of a permanent injunction, restraining the sale of alleged obscene literary books and magazines. The Court of Hustings for the City of Portsmouth entered such a permanent injunction order herein, which Petitioners argue was an unconstitutional infringement upon their rights protected by the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America. This void in the grant of authority to the Court of Hustings for the City of Portsmouth is apparent when subsection 13 of the Virginia Code is considered in relation to Subsection 11, which refers only to "temporary restraining order", and the Virginia Code is devoid of any other authority to permanently enjoin the dissemination of literary materials. This unconstitutional usurping of authority by the Court of Hustings for the City of Portsmouth, and the denial of the Petitioners' rights pro-

tected by the Constitution of the United States of America, should not be countenanced by this Court.

II. Petitioners argue that all of the approximately 300 books and magazines are protected by the First Amendment to the Constitution of the United States of America, made applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, and that the decision of the Court of Hustings for the City of Portsmouth was contrary to the law and the evidence. All of the witnesses who supplied evidence in the Court of Hustings for the City of Portsmouth agreed that the approximately 300 books and magazines at issue did not constitute "hard core pornography", (T. 53, 89-90, 127, 159, 196-197). Since 1957, when this Court decided *Roth v. U.S.*, 354 U.S. 476, it has been recognized that sex and obscenity are not synonymous and constitutional protection has been afforded all literary materials not utterly without social value, *Memoirs v. Massachusetts*, 383 U.S. 413. In the case of *Redrup v. New York*, 386 U.S. 767, this Court, per curiam, in reaffirming the definition of obscenity in *Roth v. United States*, supra, as amended by this Court's subsequent decisions, considered three qualifications: (1) Protection of juveniles; (2) Assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to the erotic material; (3) Pandering of the material as described in *Ginzburg v. U.S.*, 383 U.S. 463. In the Court of Hustings for the City of Portsmouth, it was stipulated that the literary materials at issue were not sold or distributed to juveniles, (T. 3). There was no testimony afforded, and there could not have been any testimony, regarding alleged pandering or obtrusive advertising. Petitioners argue that it is irrefutable that the approximately 300 books and magazines involved herein are therefore, within the scope of the protection of the First Amendment to the Constitution of the United States of America. This Court has on numerous occasions re-emphasized this interpretation of the law of obscenity in per curiam decisions granting certiorari and reversing lower Courts citing only *Redrup v. New*

*York,* supra. Of these recent decisions we should compare *Carlos v. New York,* 396 U.S. 119, reversing 24 N.Y.2d 86, 301 N.Y.S.2d 96, wherein the New York Court of Appeals had held the questioned material to be "hard core pornography. In the Court of Hustings for the City of Portsmouth, all of the testimony, the Commonwealth's evidence and the testimony elicited by the Defense, was that the approximately 300 books and magazines did not constitute hard core pornography, and did not vividly depict scenes of fellatio, cunnilingus or coitus. Some of the books and magazines contained photographs depicting *simulated* erotic activities that suggest, but leave to the imagination, the consummation of the sexual activities. The photographic technique is superior and the books and magazines are protected by the First Amendment to the Constitution of the United States of America. Both the Court of Hustings for the City of Portsmouth and the Supreme Court of Appeals of Virginia, refused to consider this Court's decision in *Bloss v. Dykema,* 398 U.S. 273, reversing 17 Mich. App. 318, 169 N.W.2d 367, by condemning as obscene the magazines "Cover Girl" and "Exciting" which were the subject of the latter decision wherein this Court was again forced to apply the protection of the First Amendment to challenged literary material.

The Supreme Court of Virginia refused to make an independent judgment of obscenity or to consider this Court's action in *Burgin v. South Carolina,* No. 70-122,___U.S.___. ___L.Ed.2d___, reversing the Supreme Court for the State of South Carolina, 178 S.E.2d 325, in which opinion the South Carolina Court described the magazines, "Mirage", "Togetherness", "Fair Lady, No. 1", and "Flesh Fantasy, Vol. II, No. 1", as follows:

> "... We have studied the material to make a de nova determination of obscenity vel non. We find that each of the four magazines is comprised almost totally of photographs which display nude young women in poses that center the attention of the viewer upon the vulva and surrounding area. They obtrusively expose

> the female genitalia in an obvious design to appeal to a prurient interest in sex. They serve no additional purpose except to produce revenue for the sellers. These magazines are a degrading, disgusting exploitation containing no pretense of artistic value. They cannot be permitted in a society which hopes to retain any semblance of constitutional and moral stability. The dissemination of this smut, which is utterly without redeeming social value, cannot be placed beyond the reach of the law. The argument that adults should be free to see and read what they want must be weighed in light of reality. Each time the first amendment is stretched to include license to sell materials of the type involved in this action, a new flood of publications come into being. The benefits to society from freedom of speech and of press can best be protected by curbing license. Applying contemporary community standards, we find beyond a reasonable doubt the dominant theme of the magazines taken as a whole appeals to the prurient interests and are patently offensive and obscene in the constitutional sense. They are utterly without redeeming social value."

This Court had comparable books and magazines for consideration in Case No. 71-443, *Wiener and Dulin v. California*, ___U.S.___, 30 L.Ed.2d 539, in both of those cases, this Court on December 14, 1971, one month and three days prior to the action of the Supreme Court of Virginia, herein, granted certiorari and reversed the judgment of the lower Courts, citing *Redrup v. New York*, supra. Petitioners argue that the First Amendment to the Constitution of the United States of America must be given effect in all fifty of our United States to protect the rights of the Petitioners to sell books and magazines which are not obscene, as well as the rights of the public, in all of our fifty states, to purchase and read literary material which is not obscene as defined by this Court and thereupon, a Writ of Certiorari to the Supreme Court of Virginia should issue and the judgment of the Court below should be reversed.

## CONCLUSION

In summary, the approximately 300 books and magazines condemned by the Courts below, do not constitute hard core pornography, although a few depict *simulated* erotic activities without vividly depicting sexual action or congress, and all said books and magazines are protected by the First Amendment to the Constitution of the United States of America, made applicable to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, and therefore, they are entitled to be declared not obscene. In addition thereto, procedurally the flaw in declaring the geographical area for consideration of community standards to be that limited area of the City of Portsmouth, Virginia, should command the issuance of a Writ of Certiorari herein. This Court should also issue a Writ of Certiorari to the Supreme Court of Virginia, to establish the right to a trial by jury in an obscenity litigation, and further, to prohibit a prior restraint on literary material without an adversary hearing as well as to afford the Petitioners the equal protection of the law as established by the prior decisions of this Court.

Therefore, it is respectfully requested that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

STANLEY M. DIETZ
*Attorney for Petitioners*

## APPENDIX

### SUPREME COURT OF VIRGINIA
### AT RICHMOND

Present: All the Justices.

HOWARD ALEXANDER, et al.,

v.

COMMONWEALTH OF VIRGINIA

PER CURIAM

Record No. 7726

Richmond, Virginia
January 17, 1972

FROM THE COURT OF HUSTINGS
FOR THE CITY OF PORTSMOUTH
R. Winston Bain, Judge

Pursuant to Code §18.1-236.3, the Commonwealth's attorney for the City of Portsmouth petitioned the trial court to adjudge certain magazines to be obscene. On August 3, 1970, a motion to dismiss was filed alleging that the statute is unconstitutional as being repugnant to the First Amendment to the Constitution of the United States. On November 4 and 5, 1970, the case was heard on its merits, and on December 5, 1970, the court entered an order adjudging the magazines obscene and restraining the sale or commercial distribution of them.

On this appeal two questions are presented. First, whether Code 18.1-236.3 is unconstitutional, and second, whether the evidence adduced at the hearing was sufficient to support the court's adjudication that the magazines were obscene.

The Supreme Court of the United States has held that obscenity is beyond the protection of the First Amendment. *Roth v. United States*, 354 U.S. 476 (1957). Code §18.1-236.3 provides a judicial procedure for adjudicting whether material is obscene or not. It is not a criminal proceeding. The constitutional attack on this statute is that it does not provide for a jury trial, permits a prior restraint on literary material, provides a community standard for adjudg-

ing obscenity rather than a national standard and is vague in violation of the Constitution. We find no merit to any of these alleged constitutional infirmities.

Counsel for appellants admits there has been no ruling by the Supreme Court requiring a jury trial in a proceeding of this kind. Since Code § 18.1-236.3 was not in force when the Constitution of the United States was adopted, a jury trial is not constitutionally required. Bowman v. Va. State Entomologist, 128 Va. 351, 372, 105 S.E. 141, 148 (1920).

Appellants assert the narrow contention that prior restraint or literary material violates the First Amendment. The statute in question does permit the issuance of a temporary restraining order upon four days' notice, after the court has found probable cause to believe the material is obscene and has issued a show cause order. But, no temporary restraining order was issued in this case. Even so, all prior restraint is not necessarily prohibited. *Times Film Corp. v. Chicago,* 365 U.S. 43 (1961). *See also Freedman v. Maryland,* 380 U.S. 51 (1965) and *United States v. Thirty-Seven Photographs,* 402 U.S. 363 (1971).

The Supreme Court has not ruled on the question whether the standard for judging obscenity should be a community or national standard.[1] We are of opinion that a community standard is the proper standard. In light of the diversity of opinion that exists in our nation, it would be impossible to establish a workable national standard. See Chief Justice Warren's dissenting opinion in *Jacobellis v. Ohio,* 378 U.S. 184 (1964).

Finally, the statute is not unconstitutional on account of vagueness. It provides a definite procedure for determining whether certain materials alleged to be obscene are, in fact, obscene. If the material is adjudged to be obscene then it is perfectly proper to restrain its sale or distribution.

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[1] According to the Attorney General, the issue of Community standard versus national standard is pending before the Supreme Court in *Miller v. California,* 401 U.S. 992 (1971).

With regard to the court's ruling that the magazines are obscene, we find that the evidence was sufficient to support that ruling. An expert witness for the Commonwealth testified concerning the community's standard for judging obscene material. He had reviewed the magazines in questio and said they did not meet the community standard. Further, the court itself viewed all the magazines in question and found them to be obscene in light of the community standards.

During oral argument, we invited appellants' counsel to point out which magazines were not obscene. He candidly admitted he had not reviewed all the magazines and was unable to say which ones were not obscene.

The judgment appealed from is

*Affirmed.*

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VIRGINIA:

IN THE COURT OF HUSTINGS
FOR THE CITY OF PORTSMOUTH

IN THE MATTER OF
A NUMBER OF OBSCENE BOOKS

PETITION FOR ORDER TO DECLARE BOOKS OBSCENE PURSUANT TO SEC. 18.1-236.3 of the Code of Virginia, 1950, as amended

PETITION FOR ORDER TO DECLARE
BOOKS OBSCENE PURSUANT TO
SECTION 18.1-236.3 of the
Code of Virginia, 1950,
as amended

The undersigned Petitioner respectfully represents as follows:

1. The petitioner is the Attorney for the Commonwealth for the City of Portsmouth, Virginia.

2. The petitioner has reasonable cause to believe that Howard Alexander and Frank Collier are engaged in the sale and commercial distribution of a number of obscene books at their place of business at 513 High Street in the City of Portsmouth, Virginia.

3. The said books are listed by nmae or title and publisher, were known, on the attached sheets which are made a part hereof.

4. The said books picture the totally nude body of males and females. The genitals of thy males and females are exposed with the focal point of the pictures o the genitals. Many of the said pictures include more than one nude figure, either of the same sex or a different sex, in poses suggestive of human copulation or of abnormal sexual activity.

WHEREFORE, your Petitioner prays that the said books be adjudged obscene; and that a temporary restraining order be issued against the sale or distribution of the said books.

Von L. Piersall, Jr.
Commonwealth's Attorney for
the City of Portsmouth

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## PETITION FOR ORDER TEMPORARILY RESTRAINING THE SALE OR DISTRIBUTION OF CERTAIN BOOKS

The undersigned Petitoner respectfully represents as follows:

1. The Petitioner is the Attorney for the Commonwealth for the City of Portsmouth and is Petitioner in a matter on the Law Docket numbered 6244, concerning certain alleged obscene books.

2. These alleged obscene books are more fully named by title in a show cause order in the papers of the aforementioned Petition.

3. These said books have been examined by the Court and on this the 3rd day of June, 1970 the Court has issued an Order to Show cause why these books should not be adjudicated obscene, pursuant to Article 3, Chapter 4, Title 18.1 of the Code of Virginia, 1950 as amended.

Wherefore, your Petitioner prays that this Honorable Court issue an Order temporarily restraining the sale or distribution of the said books in accordance with the aforementioned Article, Chapter and Title of the Code of Virginia.

Von L. Piersall, Jr.
Commonwealth's Attorney for
the City of Portsmouth

---

NOTICE

TO:

Howard Alexander
c/o Village Books, Inc.
121 Brook Avenue
Norfolk, Virginia

Frank Collier
513 High Street
Portsmouth, Virginia

Take notice that the Commonwealth's Attorney did, on the 3rd day of June, 1970, file in The Court of Hustings for the City of Portsmouth a petition for a temporary restraining order against the sale or distribution of certain books alleged to be obscene, which books are more fully described by title and publisher in a show cause order issued by Judge R. Winston Bain of The Court of Hustings for the City of Portsmouth on June 3, 1970 and prior to the filing of the aforementioned petition.

You are further notified that the undersigned will appear before Judge R. Winston Bain of The Court of Hustings of said City on June 12, 1970, at 10:00 o'clock a.m., or as soon thereafter as the business of the Court will permit, and will ask the Court to issue a temporary restraining order against the sale or distribution of the aforementioned books, pursuant to Article 3, Chapter 4, Title 18.1 of the Code of Virginia, 1950, as amended.

Dated June 3, 1970.

Von L. Piersall, Jr.
Attorney for the Commonwealth
of the City of Portsmouth

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SHOW CAUSE ORDER

On May 19, 1970, came Von L. Piersall, Jr., Attorney fo; the Commonwealth for the City of Portsmouth, and by petition moved that certain allegedly obscene books be adjudged obscene in accordance with the procedure set out in Sec. 18.1-236.3 of the Code of Virginia, 1950, as amended.

The Court having forthwith examined the aforementioned books, doth find probable cause to believe certain of said books to be obscene, which books are more precisely described by title and publisher, if known, on a list attached hereto and made a part hereof; It Is Therefore Ordered that a copy of this Order be published once a week for two successive weeks in the Ledger-Star, a newspaper of general circulation in the City of Portsmouth, and be served by registered mail upon the said publishers of said books, where address known, and on Howard Alexander and Frank Collier, and these persons and all others who are interested in the sale or commercial distribution of these books and all other interested parties who may be unknown may appear on the date this Order is returnable to show cause why these books should not be adjudicated obscene. And this Order to Show Cause shall be returnable at 10:00 A.M. on Friday, July 17, 1970.

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|---|---|---|
| Amateur Jaybird | Jaybird Enterprises | No. 5 |
| Annie | White Stag Pub. Co. | |
| Adult Movies Illustrated | Classic Publications | Vol. 3 No. 5 |
| Act One | Tudor House, Inc. | |
| After Hours | Classic Publications | Vol. 5 No. 2 |
| About Face | Tudor House Pub. | No. 1 |
| Affair | Jaybird Enterprises | Vol. 6, No. 4 |
| All New '69 Nudies | Tudor House Pub. | No. 1 |
| All New '69 Nudies | Tudor House Pub. | No. 2 |
| Butch Tricks | None | |
| Beautiful Boys | The Dom | Vol. 1 No. 1 |
| Black Hose | Dominion Pub. Co. | No. 14 |
| Boys & Men in Uniform | Overstock Book Co. | |
| Big Boys | None | No. 11 |
| Broad Tales | | No. 5 |
| Brazen Confessions | Star Distributors | |
| Black Lashes | None | No. 1 |
| Break Thru | Jaybird Enterprises | No. 5 |
| Belles in Colour | Wyngate & Bevins, Inc. | No. 6 |
| Belly Button | Calga Pub., Inc. | Vol. 1 No. 1 |
| Black and Sexy | Tudor House, Inc. | No. 2 |
| Baby Cake | Tudor House, Inc. | No. 2 |
| Busy Body | Tudor House, Inc. | No. 1 |
| Black Beautiful | | No. 14 |
| Broad View | Press Arts, Inc. | No. 22 |
| Black Silk Stockings | Classic Pub. | Vol. 5 No. 3 |
| Bunny No. 1 | Sunshine Enterprises | No. 1 |
| Body Shop | Jaybird Enterprises | Vol. 7 No. 1 |
| Broadside | Jaybird Enterprises | No. 5 Vol. 3 |
| Boy Friends | Pendulum Pub. | Vol. 2 No. 2 |
| Bottom | Jaybird Enterprises | Vol. 1 No. 2 |
| Blazing Films | Pendulum Press | Vol. 4 No. 1 |
| Baal | None | Special No. 3 |
| Copper Cuties | Dominion Pub. Co. | No. 13 |
| Copper Cuties | Dominion Pub. Co. | Vol. 1 No. 2 |
| Cinerotic | Orbit Pub. | Vol. 3 No. 3 |
| Cinema Keyhole | Classic Pub. | Vol. 1 No. 4 |
| Cinema Keyhole | Orbit Pub. | Vol. 2 No. 1 |

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|---|---|---|
| Color Special | | No. 11 |
| Cinema Searcher | | Vol. 1 No. 5 |
| Cupie Dolls | E.L. Pub. Co. | No. 1 |
| Candy | Tudor House, Inc. | No. 1 |
| Christina | E.L. Pub. Co. | No. 1 |
| Cuddleup | E.L. Pub. Co. | No. 1 |
| Campus Jaybird | Jaybird Enterprises, Inc. | No. 6 |
| Cinema Scorchers | Classic Pub. | Vol. 2 No. 1 |
| Cinema Scorchers | Classic Pub. | Vol. 1 No. 2 |
| The Continental Spectator | . | Vol. 4 No. 9 |
| Champagne | Jaybird Enterprises, Inc. | Vol. 7 No. 3 |
| Cocktail | Jaybird Enterprises | Vol. 9 No. 4 |
| Celluloid Capers | Dominion Pub. Co. | Vol. 1 No. 7 |
| Cuddles No. 1 | Sunshine Enterprises | No. 1 |
| Cici | Tudor House Pub. | Collector's Issue No. 1 |
| Cupcake | None | |
| Cover Girl | Nordick Bladcentral A/S | All issues |
| Duet Edition 1 | Tudor House Pub. | |
| Dimples | Tudor House Pub. | |
| Dahlings | CAJ Enterprises | |
| Dover Girl | Unknown | All issues |
| Dolly | D.M.F.-Forlaget | All issues |
| Daring Films | Obit Publications | Vol. 3 No. 5 |
| Daring Films | Classic Publications | Vol. 4 No. 4 |
| Dynamic Films | Pendulum Press | Vol. 4 No. 1 |
| Domino | A.B. Gammla-Stand Press | Vol. 1 No. 1 |
| Dingle Dangle No. 3 | Phoenix Pub., Ltd. | Vol. 3 |
| Double Pleasure | Tudor House Pub. | |
| Dears & Rears No. 4 | Tudor House Pub. | No. 4 |
| Exciting | Nordisk Bladcentral A/S | All issues |
| Exclusive in Color | Nordisk Bladcentral A/S | All issues |
| Eclipse | Phoenix Pub., Ltd. | Vol. 1 No. 4 |
| Eclipse | Phoenix Pub., Ltd. | Vol. 1 No. 3 |
| Erick | None | No. 1 |
| Ecstasy | Feature Pub. | Vol. 1 No. 11 |
| Ecstasy | Pendulum Pub., Inc. | Vol. 2 No. 1 |
| Edie | Tudor House Pub. | No. 1 |
| Eve's Rib | Jaybird Enterprises | Vol. 1 No. 4 |

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|---|---|---|
| The Erotic Cinema | Orbit Publications | Vol. 1 No. 1 |
| The Erotic | | Vol. 1 No. 2 |
| Flaming Films | Dominion Pub. Co. | |
| Fanny | D.M.F.-Forlaget | All issues |
| Fancy | ABC Publishers | All issues |
| Femina | Parliament Publications | Vol. 1 No. 2 |
| Fred | Overstock Book Co. | Series #3 |
| Flaming Films | Dominion Pub. Co. | No. 13 |
| Fiery Films | Classic Publications | Vol. 3 No. 4 |
| Fiery Films | Orbit Publications | Vol. 3 No. 3 |
| Film Inferno | Classic Publications | Vol. 1 No. 3 |
| Film & Figures | Jaybird Enterprises, Inc. | No. 18 |
| Frisky | Tudor House, Inc. | No. 1 |
| Fun & Games | Pendulum Press | Vol. 2 No. 1 |
| French Frills | Jaybird Enterprises, Inc. | Vol. 9 No. 1 |
| Frenchette | Tudor House Pub. | |
| Fancy Pants | Tudor House Pub. | |
| Fifi | Tudor House Pub. | |
| Fantasia | None | Issue No. 1 |
| 5 in a Barn | None | |
| Girl Companions | Nordick Bladcentral A/S | All issues |
| Gloria | Dominion Pub. Co. | No. 10 |
| Gloria | White Stag Pub. Co. | No. 11 |
| Groovy Girls | Dominion Pub. Co. | No. 10 |
| Garber Girls | Pendulum Press | Vol. 4 No. 1 |
| Gay Mood | Tudor House, Inc. | No. 1 |
| Gaetano No. 1 | Gaetano | No. 1 |
| Going Steady | Foto-Form Publications | No. 1 |
| Groovy Nudists | May Publishing Co. | No. 2 |
| Gigi | Tudor House Pub. | |
| Gold Diggers | Pendulum Press | Vol. 2 No. 1 |
| Golden Garter | None | No. 2 |
| The Girl Next Door | Dominion Pub. Co. | No. 1 |
| Hardrock | None | No. 2 |
| Honeymooners | Tudor House, Inc. | No. 2 |
| Honeymooners | Tudor House, Inc. | No. 1 |
| Hit Fun | Calga Pub., Inc. | Vol. 1 No. 1 |
| High Jinx | Jaybird Enterprises, Inc. | Vol. 1 No. 2 |

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| Heads Up | Pendulum Press | Vol. 2 No. 1 |
| Husky | None | No. 3 |
| His & Hers | Jaybird Enterprises, Inc. | No. 6 |
| The Hustler | None | No. 1 |
| Intima | Phoenix Pub., Lts. | Vol. 1 No. 2 |
| In Nudist | Dominion Pub. Co. | No. 10 |
| Informal | Tudor House Pub. | |
| In Private | AB Gammonla-Stand Press | Vol. 1 No. 1 |
| Ingenue | None | Issue No. 1 |
| Intimate Confessions | None | Vol. 1 No. 1 |
| Jaybird Experiences | Jaybird Enterprises, Inc. | No. 13 |
| Joy | White Stag Pub. Co. | No. 1 |
| Jade, the Color Magazine | None | Vol. 1 No. 1 |
| Jaybird Swingers | Jaybird Enterprises, Inc. | No. 1 |
| Jaybird Journal | Jaybird Enterprises, Inc. | No. 19 |
| Jaybird Happening | Jaybird Enterprises, Inc. | No. 26 |
| Jaybird Happening | Jaybird Enterprises, Inc. | No. 25 |
| Jaybird U.S.A. | Jaybird Enterprises, Inc. | No. 17 |
| Jaybird Scene | Jaybird Enterprises, Inc. | No. 5 |
| The Jaybird Era | Jaybird Enterprises, Inc. | No. 3 |
| King & Queens | Tudor House, Inc. | |
| Kick | | Vol. 1 No. 2 |
| Karen | White Stag Pub. Co. | No. 9 |
| Kim | Tudor House, Inc. | No. 1 |
| Kitty | Tudor House, Inc. | No. 1 |
| King & Queens | Tudor House, Inc. | No. 1 |
| Kozy Kids | Tudor House, Inc. | No. 1 |
| Kookie | Marquis Publishing | Vol. 1 No. 1 |
| Lovely | Triol AB Kanaltorget 1 | All issues |
| Ladies | Triol AB Kanaltorget 1 | All issues |
| Loving Couples | Phoenix Publishers, Ltd. | Collecgor's Edition |
| Libertine 3 | Phoenix Publishers, Ltd. | |
| Lolly Pops | Tudor House, Inc. | No. 1 |
| Lookers | Mecca Magazine | No. 1 |
| Lusty | Mecca Magazine | No. 1 |
| Love Me | Calga Publishers, Inc. | Vol. 1 No. 1 |
| Lovebird | Tudor House, Inc. | No. 2 |
| Lovers #2 | Tudor House, Inc. | No. 2 |

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| Lovers #1 | Tudor House, Inc. | No. 1 |
| Late Show | Jaybird Enterprises, Inc. | Vol. 7 No. 3 |
| Late Date | Jaybird Enterprises, Inc. | Vol. 7 No. 2 |
| Luv | None | |
| Love Date | | Vol. 1 No. 1 |
| Limbo | None | |
| The McCoy | None | Issue No. 1 |
| Mustang | None | No. 1 |
| Marilyn | Scandinavian Art Magazine (dist. by Central Mag. Sales, Ltd.) | All issues |
| Male Nudes | None | No. 5 |
| Midnight | Jaybird Enterprises, Inc. | Vol. 8 No. 4 |
| Muff | T.R. Press, Inc. | No. 2 |
| Ming | Tudor House Pub. | No. 1 |
| Make Out | Star Distributors | Vol. 1 No. 1 |
| Michelle No. 1 | Sunshine Enterprises | No. 1 |
| Missie No. 1 | Sunshine Enterprises | No. 1 |
| Mamas | | Vol. 2 No. 6 |
| Mode | None | Issue No. 1 |
| Madames | C A J Enterprises | |
| The Male Swinger | None | No. 5 |
| New Directions | Jaybird Enterprises, Inc. | No. 17 |
| Nudist Youth | Dominion Pub. Co. | No. 14 |
| Nude Epic | Dominion Pub. Co. | |
| Nudist Photography | Dominion Pub. Co. | No. 7 |
| Nude Reflections | | No. 2 |
| Nude Rhapsody | Calga Pub., Inc. | No. 1 |
| Nudist Studio Review | | No. 1 |
| Novarro | Guild Press, Ltd. | No. 105 |
| Nude Explorations | White Stag Pub. Co. | No. 15 |
| Nude Era | Concorde Pub. Co. | Vol. 1 No. 4 |
| Nude Rebels | Pendulum Press | Vol. 1 No. 2 |
| The Nudist Idea | Elysium, Inc. | No. 20 |
| Naked Love | Phoenix Pub., Ltd. | |
| The New Touch | Jaybird Enterprises, Inc. | Vol. 1 No. 2 |
| Naked Breakout | Jaybird Enterprises, Inc. | Vol. 1 No. 2 |
| Nudist Youth | | No. 13 |
| Naked Place | Venice Pub. Corp. | No. 3 |

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| Nudism Today | Elysium, Inc. | No. 38 |
| Nude Trip | Modern Nudist Asso. | No. 29 |
| Nude Lark | Elysium, Inc. | |
| Nude Image No. 24 | Jaybird Enterprises, Inc. | No. 24 |
| Nudie Fox F | Sun-Air Pub. Co. | Vol. 1 No. 4 |
| Nudist Idea 20 | | No. 20 |
| The Nude World | R.N.S. Publishing | Vol. 1 No. 1 |
| Nude Living | Elysium, Inc. | No. 58 |
| Nylon Party | Jaybird Enterprises, Inc. | Vol. 6 No. 4 |
| Naked House Parties | Jaybird Enterprises, Inc. | No. 1 |
| National Registry | Tudor House Pub. | Issue No. 3 |
| Night Crawlers No. 1 | Tudor House Pub. | No. 1 |
| Naked Now | | No. 9 |
| New Directions | | No. 16 |
| Nudist Tempo | House of Price | Vol. 1 No. 2 |
| Naked Confessions | None | |
| Over Twenty-One | E.L. Pub. Co., Inc. | No. 1 |
| One Plus One | Pendulum Pub., Inc. | Vol. 2 No. 1 |
| Orpheus | None | Special No. 2 |
| Phallic Development | Media Arts | |
| Phallic Development in Mature Adult | Media Arts | |
| Phallic Development in Young Adult | Media Arts | |
| Private Films | Jaybird Enterprises, Inc. | Vol. 1 No. 3 |
| Private Films | Jaybird Enterprises, Inc. | Vol. 1 No. 2 |
| Pearl, the All Color Magazine | None | Vol. 1 No. 1 |
| Psych It To Me | Phoenix Pub., Ltd. | No. 4 |
| Pendulum | Pendulum Pub., Inc. | Vol. 2 No. 2 |
| Partners | Tudor House, Inc. | No. 2 |
| Party Pair | Tudor House Pub. | No. 1 |
| Party Pair | Tudor House Pub. | No. 1 Ed. 1 |
| Partners | Tudor House Pub. | No. 1 |
| Play Time | Star Distributors | |
| Pleasure Seekers | Action Pub. Service | Issue 7 Vol. 2 No. 3 |
| Petite | Tudor House, Inc. | |
| Peek | Tudor House Pub. | |
| Private Sexational | None | Vol. No. 2 |

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| Pussy Willow | | Vol. 2 No. 2 |
| Quickie | Jaybird Enterprises, Inc. | Vol. 7 No. 2 |
| Rebel | Tudor House Pub. | Issue No. 1 |
| Rene | Tudor House Pub. | Collector's Iss. No. 1 |
| Rhapsody | | No. 6 |
| Ramrod | None | |
| Romp Set | | May '69 |
| Ruby, The Golden Series | None | Vol. 1 No. 1 |
| Raw Confessions | None | Vol. 1 No. 2 |
| Rex | | No. 1 |
| Roulette | | Vol. 3 No. 4 |
| Rare Mood | Tudor House, Inc. | |
| Round the World Girls in THP | Tudor House, Inc. | |
| Shocking Screen | Dominion Pub. Co. | Vol. 1 No. 3 |
| Shocking Screen | Dominion Pub. Co. | No. 8 |
| Sexy | ABC Publishers | All issues |
| Sun Buffs | Triumph News Co. | No. 8 |
| Skin Film | AB Gammla-Stand Press | Vol. 1 No. 1 |
| Secret Hours | Jaybird Enterprises, Inc. | Vol. 7 No. 4 |
| Springtime Youth | Calafram Enterprises, Inc. | No. 2 |
| Sandrina | Scandinavian Art Mag. | All copies |
| Sunlane | Dominion Pub. Co. | No. 5 |
| Sixty Nine Hours with Michelle | Jaybird Enter. | Vol. 2 No. 1 |
| Sun West | Dominion Pub. Co. | No. 14 |
| Sun West | Dominion Pub. Co. | No. 13 |
| Sol Guest | Dominion Pub. Co. | No. 10 |
| Sumpin Different | Tudor House, Inc. | |
| Snap | Jaybird Enter., Inc. | Vol. 9 No. 2 |
| Swap | Pendulum Press | Vol. 4 No. 4 |
| Savage Sex | Pendulum Press | Vol. 2 No. 1 |
| Skin Film | | Vol. 1 No. 1 |
| Suburban Jaybird | Jaybird Enter., Inc. | No. 6 |
| Sun Buffs | Triumph News Co., Inc. | Vol. 1 No. 3 |
| Sun Flair | Sun-Air Pub. Co. | Vol. 1 No. 3 |
| Sundisk | Elysium, Inc. | No. 6 |
| Sunrise | Elysium, Inc. | |

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| Sol 70 | Jaybird Enter., Inc. | No. 23 |
| Swing Modern | Press Arts, Inc. | Vol. 1 No. 1 |
| Sex Romances | Pegasus Productions | |
| Sex Confidential | Pegasus Productions | |
| Switch Hitters | Calga Pub., Inc. | Vol. 1 No. 1 |
| The Seekers | Seekers, Inc. | Iss. 4 No. 2191C N.Y. |
| Splits | Tudor House Pub. | |
| Searchers | | Vol. 2 No. 1 |
| Searchers | | Vol. 1 No. 2 |
| Sissy No. 1 | CAJ Enterprises | No. 1 |
| Searchers | | Vol. 1 No. 3 |
| Solo | Jaybird Enterprises, Inc. | Vol. 1 No. 3 |
| Savage Sex | | Vol. 2 No. 1 |
| Sissie | | |
| Sisters | | Issue No. 1 |
| Solar Scene | Orbit Publications | Vol. 2 No. 1 |
| True Nudist | Dominion Pub. Co. | |
| 21 | Jaybird Enterprises, Inc. | Vol. 2 No. 3 |
| Teen Nude | None | Vol. 1 |
| 38/26/34 | Jaybird Enterprises, Inc. | Vol. 7 No. 2 |
| Times Square Faces | None | No. 1 |
| Times Square Faces | None | No. 2 |
| Tulip Review | None | |
| Tomcat | Dominion Pub. Co. | No. 2 |
| Tease | Classic Publications | Vol. 2 No. 5 |
| Torrid Film Reviews | Orbit Publications | Vol. 3 No. 3 |
| Tina | White Stag Pub. Co. | No. 10 |
| Taurus | | |
| Throttle | None | |
| Tip Top | Jaybird Enterprises, Inc. | Vol. 9 No. 2 |
| Tootsie | Tudor House Pub. | No. 1 |
| Togetherness | Tudor House Pub. | No. 2 |
| Touch and Go | Tudor House Pub. | No. 1 |
| Two Much | Tudor House Pub. | No. 2 |
| The Thouchables | Foto-Form Pub. | No. 1 |
| Tip to Bottom No. 3 | Phoenix Pub., Ltd. | No. 3 |
| Tonight | | Vol. 8 No. 4 |
| The Three Little Bares | Tudor House Pub. | |

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| Touch | | Iss. No. 1, Collector's Item |
| Tracey | None | Issue No. 1 |
| Topaz, the Color Magazine | None | Vol. 1 No. 1 |
| Underground Photo Album | Lunar Press | |
| Up Tight No. 2 | Tudor House Pub. | No. 2 |
| Up Tight No. 1 | Tudor House Pub. | No. 1 |
| Urban Jaybird | Jaybird Enter., Inc. | No. 3 |
| Vivian | Scandinavian Art Mag. | All copies |
| Vickings | AB Gammla-Stand Press | Vol. 1 No. 1 |
| Wonder Girl | Sunshine Enter. | Collector's Issue No. 1 |
| Wild Screen Reviews | Classic Pub. | Vol. 1 No. 1 |
| Wildest Films | Orbit Pub. | Vol. 3 No. 4 |
| Wild 'n Sassy | Tudor House Pub. | No. 1 |
| Warm Up | | No. 1 |
| Wildest | | Vol. 4 No. 2 |
| Weekend Jaybird No. 18 | Jaybird Enterprises, Inc. | |
| Weekend Jaybird No. 19 | Jaybird Enterprises, Inc. | |
| X Films | Dominion Pub. Co. | No. 14 |
| X Films | Dominion Pub. Co. | No. 13 |
| Youth in Art | None | No. 1 |
| Youth in Art | None | No. 2 |
| Youth in Art | None | No. 3 |
| Youth in Art | None | No. 4 |
| Young Mavericks | Pendulum Pub. | No. 1 |
| Young Beavers | Pendulum Press | Vol. 4 No. 2 |
| Young Stuff | Tudor House Pub. | No. 2 |
| Young Stuff | | No. 1 |
| Yum Yum | Tudor House Pub. | No. 2 |
| Yum Yum | | No. 1 |
| Your Jaybird Horoscope '70 | Jaybird Enter., Inc. | No. 1 |
| Zoom | Tudor House Pub. | |
| Zulu | Tudor House Pub. | |
| Zodiac | Guild Press, Ltd. | |

VIRGINIA: IN THE COURT OF HUSTINGS FOR THE CITY OF PORTSMOUTH IN THE MATTER OF A NUMBER OF OBSCENE BOOKS

PETITION FOR ORDER TO DECLARE BOOKS OBSCENE PURSUANT TO SEC. 18.1-236.3 OF THE CODE OF VIRGINIA, 1950, AS AMENDED

## MEMORANDUM

November 20, 1970

This matter came on to be heard on November 4, 1970, at which time the Commonwealth put on three expert witnesses and introduced as evidence the magazines in question. On the next day, the Commonwealth rested and the Defense put on three expert witnesses. The Court then took the matter under advisement.

The three (3) tests for obscenity as set forth by the Supreme Court of the United States in the case of Redrup, Petitioner v. State of New York, 386US767, are as follows:

(1) Whether or not the dominant theme of the material taken as a whole appeals to a prurient interest in sex.

(2) Whether or not the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.

(3) Whether or not the material is utterly without redeeming social value or importance.

The Court having viewed all the magainzes in question, and reviewed the cases cited by Counsel, feels that the magazines' dominant theme taken as a whole appeals to a prurient interest in sex; that they are patently offensive because they do affront contemporary community standards relating to the description or representation of sexual matters; and that the magazines are utterly without redeeming social value.

It further is the judgment of the Court that said magazines have no artistic, literary, medical, scientific, cultural or educational values considered as a whole. Thusly, it is the opinion of the Court that the said magazines are abscene.

The Commonwealth's Attorney is directed to prepare an Order adjudging the said magazines obscene and restraining the sale or distribution thereof.

/s/
Associate Judge

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THE COURT OF HUSTINGS
For The
CITY OF PORTSMOUTH
Portsmouth, Virginia

January 8, 1971

Mr. Stanley M. Dietz
Attorney at Law
1029 Vermont Avenue, N.W.
Suite 502
Washington, D.C. 20005

Mr. James Power
Attorney at Law
1412 Maritime Tower
234 Monticello Avenue
Norfolk, Virginia 23510

Re: Petition for Order to Declare Books Obscene, Pursuant to Section 18.1-236.3 of the Code of Virginia, 1950, as amended

Gentlemen:

Enclosed herewith is copy of Order I entered in the above-styled matter on December 30, 1970.

Wishing each of you a happy and prosperous New Year, I remain,

Yours very truly,
R. Winston Bain

R.W.B/lmj
Enclosure

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VIRGINIA: IN THE COURT OF HUSTINGS FOR THE CITY OF PORTSMOUTH

IN THE MATTER OF A NUMBER OF BOOKS ALLEGED TO BE OBSCENE PURSUANT TO SECTION 18.1-236.3 OF THE CODE OF VIRGINIA OF 1950, AS AMENDED

**ORDER**

It appearing to the Court that on May 19, 1970, Von L. Piersall, Jr., Attorney for the Commonwealth for the City of Portsmouth, by petition moved that certain books be adjudged obscene in accordance with the procedure as set out in Sec. 18.1-236.3 of the Code of Virginia (1950) as amended.

And upon this said petition and in accordance with the procedure in said Virginia Code Section the Court examined all of the books or magazines in question and did on the 3rd day of June, 1970, issue an Order to Show Cause why certain of the books or magazines in question should not be adjudicated obscene.

And it further appearing that Howard Alexander and Frank Collier and Village Books, Inc. and Media Arts and Guild Press, Ltd. by counsel, Stanley M. Dietz and James B. Powers, did file an answer to said petition on July 30, 1970; upon which said pleadings the cause came on to be heard on the 4th and 5th days of November, 1970, and the Court having received evidence, including testimony of experts pertaining to the obscene nature and character of the books or magazines in question and named in the

aforesaid pleadings, did make a written determination upon every such consideration relied upon in the proceedings.

It Is Therefore ADJUDGED and ORDERED in accordance with the Court's findings as set out in its written memorandum that the magazines listed in the Order to Show Cause aforementioned be and they are hereby declared obscene; and the said Howard Alexander, Frank Collier and Village Books, Inc. and Media Arts and Guild Press, Ltd., are hereby restrained from either the sale or commercial disposition of the aforementioned magazines.

A Copy Teste: Cecil W. Johnson, Clerk
By: Linda M. Jeffries, D.C.

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§ 18.1-236 CRIMES AND OFFENSES GENERALLY § 18.1-236.3

**§ 18.1-236. Indecent exposure.**—every person who intentionally makes an obscene display or exposure of his person, or the private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, shall be guilty of a misdemeanor. (1960, c. 233.)

**§ 18.1-236.3 Proceeding against book alleged to be obscene.**—

(1) Whenever he has reasonable cause to believe that any person is engaged in the sale or commercial distribution of any obscene book, any citizen or the attorney for the Commonwealth of any county or city, or city attorney in which the sale or commercial distribution of such book occurs may institute a proceeding in any court of record in said city or county for adjudication of the obscenity of the book.

(2) The proceeding shall be instituted by filing with the court a petition

(a) directed against the book by name or description;

(b) alleging the obscene nature of the book, and

(c) listing the names and addresses, if known, of the author, publisher, and all other persons interested in its sale or commercial distribution.

(3) Upon the filing of a petition pursuant to this article, the court in term or in vacation shall forthwith examine the book alleged to be obscene. If the court had no probable cause to believe the book obscene, the judge thereof shall dismiss the petition; but if the court find probable cause to believe the book obscene, the judge thereof shall issue an order to show cause why the book should not be adjudicated obscene.

(4) The order to show cause shall be:

(a) directed against the book by name or description;

(b) published once a week for two successive weeks in a newspaper of general circulation within the county or city in which the proceeding is filed;

(c) if their names and addresses are known, served by registered mail upon the author, publisher, and all other persons interested in the sale or commercial distribution of the book; and

(d) returnable twenty-one days after its service by registered mail or the commencement of its publication, whichever is later.

(5) When an order to show cause is issued pursuant to this article, and upon four days' notice to be given to the persons and in the manner prescribed by the court, the court may issue a temporary restraining order against the sale or distribution of the book alleged to be obscene.

(6) On or before the return date specified in the order to show cause, the author, publisher, and any person interested in the sale or commercial distribution of the book may appear and file an answer. The court may by order permit any other person to appear and file an answer amicus curiae.

(7) If no one appears and files an answer on or before the return date specified in the order to show cause, the court, upon being satisfied that the book is obscene, shall order the clerk of court to enter judgment that the book is obscene, but the court in its discretion may except from its judgment a restricted category of persons to whom the book is not obscene.

(8) If an appearance is entered and an answer filed, the court shall order the proceeding set on the calendar for a prompt hearing. The court shall conduct the hearing in accordance with the rules of civil procedure applicable to the trial of cases by the court without a jury. At the hearing, the court shall receive evidence, including the testimony of experts, if such evidence be offered, pertaining to:

(a) the artistic, literary, medical, scientific, cultural and educational values, if any, of the book considered as a

(b) the degree of public acceptance of the book, or books of similar character, within the county or city in which the proceeding is brought;

(c) the intent of the author and publisher of the book?

(d) the reputation of the author and publisher;

(e) the advertising, promotion, and other circumstances relating to the sale of the book;

(f) the nature of classes of persons, including scholars, scientists, and physicians, for whom the book may not have prurient appeal, and who may be subject to exception pursuant to subsection (7).

(9) In making a decision on the obscenity of the book, the court shall consider, among other things, the evidence offered pursuant to subsection (8), if any, and shall make a written determination upon every such consideration relied upon in the proceeding in his findings of act and conclusions of law or in a memorandum accompanying them.

(10) If he finds the book not obscene, the court shall order the clerk of court to enter judgment accordingly. If

he finds the book obscene, the court shall order the clerk of court to enter judgment that the book is obscene, but the court, in its discretion, may except from its judgment a restricted category of persons to whom the book is not obscene.

(11) While a temporary restraining order made pursuant to subsection (5) is in effect, or after the entry of a judgment pursuant to subsection (7), or after the entry of judgment pursuant to subsection (1), any person who publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits the book, or has the book in his possession with intent to publish, sell, rent, lend, transport in intrastate commerce, or commercially distribute to exhibit the book, is presumed to have knowledge that the book is obscene under §§ 18.1-227 through 18.1-233 of this article.

(12) Any party to the proceeding, including the petitioner, may appeal from the judgment of the court to the Supreme Court of Appeals of Virginia, as otherwise provided by law.

(13) It is expressly provided that the petition and proceeding authorized under this article, relating to books alleged to be obscene, shall be intended only to establish scienter in cases where the establishment of such scienter is thought to be useful or desirable by the petitioner; and the provisions of § 18.1-236.3 shall in nowise be construed to be a necessary prerequisite to the filing of criminal charges under this article. (1960, c. 233.)

## AMENDMENTS TO THE CONSTITUTION.[9]

### [AMENDMENT I]

*[Freedom of Religion, of Speech, and of the Press]*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

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### [AMENDMENT V]

*[Rights of Accused in Criminal Proceedings]*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### [AMENDMENT VI]

*[Right to Speedy Trial, Witnesses, etc.]*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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[9]The first ten amendments were all proposed by Congress on September 25, 1789, and declared ratified on December 15, 1791.

[AMENDMENT VII]

*[Trial by Jury in Civil Cases]*

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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[AMENDMENT XIV]

Section 1.

*[Citizenship Rights Not to Be Abridged by States]*

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.